SPECIALTY CONTRACTS AND EQUITABLE DEFENCES.

IT has been often said that a seal imports a consideration, as if a consideration were as essential in contracts by specialty as it is in the case of parol promises. But it is hardly necessary to point out the fallacy of this view. It is now generally agreed that the specialty obligation, like the Roman *stipulatio*, owes its validity to the mere fact of its formal execution. The true nature of a specialty as a formal contract was clearly stated by Bracton: —

"Per scripturam vero obligatur quis, ut si quis scripserit alicui se debere sive pecunia numerata sit sive non, obligatur ex scriptura, nec habebit exceptionem pecuniæ non numeratæ contra scripturam, quia scripsit se debere."[1]

Bracton's statement is confirmed by a decision about a century later. The action was debt upon a covenant to pay £100 to the plaintiff upon the latter's marrying the defendant's daughter. It was objected that this being a debt upon a covenant touching marriage was within the jurisdiction of the spiritual court. But the common-law judges, while conceding the exclusive jurisdiction of the spiritual court if the promise had been by parol, gave judgment for the plaintiff, because this action was founded wholly upon the deed.[2] In another case it is said: "In debt upon a contract the plaintiff shall show in his count for what consideration (*cause*) the defendant became his debtor. Otherwise in debt upon a specialty (*obligation*), for the specialty is the contract in itself."[3]

The specialty being the contract itself, the loss or destruction of the instrument would logically mean the loss of all the obligee's rights against the obligor. And such was the law. "If one loses his obligation, he loses his duty."[4] "Where the action is upon a specialty, if the specialty is lost, the whole action is lost."[5] The

[1] Bracton, 100, b.

[2] Y. B. 45 Ed. III. 24–30. To the same effect, Fitz. Ab. Dett. 166 (19 Rich. II.).

[3] Bellewe (ed. 1569) 111 (8 Rich. II.).

[4] Y. B. 27 Hen. VI. 9–1, per Danby.

[5] Y. B. 24 Ed. III. 24–1, per Shardelowe, with the approval of Stonore, C. J., and Wilughby, J. To the same effect, Y. B. 3 Ed. III. 31, b–1; Y. B. 4 Hen. IV. 17–14; Y. B. 4 Hen. VI. 17–1; Y. B. 19 Hen. VI. 6–11.

injustice of allowing the obligor to profit at the expense of the obligee by the mere accident of the loss of the obligation is obvious. But this ethical consideration was irrelevant in a court of common law. It did finally prevail in Chancery, which, in the seventeenth century, upon the obligee's affidavit of the loss or destruction of the instrument, compelled the obligor to perform his moral duty.[1] A century later the common-law judges, not to be outdone by the chancellors, decided, by an act of judicial legislation, that if profert of a specialty was impossible by reason of its loss or destruction, the plaintiff might recover, nevertheless, upon secondary evidence of its contents.[2]

The difference between the ethical attitude of equity and the unmoral (not immoral) attitude of the common law in dealing with specialty contracts appears most conspicuously in the treatment of defences founded upon the conduct of the obligee. As the obligee, who could not produce the specialty, was powerless at common law against an obligor, who unconscionably refused to fulfil his promise, so the obligor who had formally executed the instrument was, at common law, helpless against an obligee who had the specialty, no matter how reprehensible his conduct in seeking to enforce it. On the other hand, as equity enabled the owner of a lost obligation to enforce it against an unjust obligor, so also would the Chancellor furnish the obligor with a defence by enjoining the action of the obligee, whenever it was plainly unjust for him to insist upon his strict legal right.

Let us examine the usual defences in the light of the authorities.

[1] Equity seems to have proceeded rather cautiously in giving relief in the case of lost obligations. In 1579 an obligee obtained a decree against an obligor who had wrongfully obtained the specialty. Charnock *v.* Charnock, Tothill, 267. See also King *v.* Hundon (1615), Hob. 109; Barry *v.* Style (1625), Latch, 24; Abdee's Case (1625), Latch, 146. In 1625, in Anon. Poph. 205, Latch, 148, s. c., Doderidge, J., said: "The grantee of the rent-charge, having now lost his deed, can have no remedy in equity, for in this case *equitas sequitur legem.*" Jones, J., and Whitlock, J., were of the same opinion; Doderidge, J., then added: "If the grantee had lost the deed by a casual loss, as by fire, &c., in such a case he shall have remedy in equity." See to the same effect, Barry *v.* Style, Latch, 24, per Jones, J., and Abdee's Case, Latch, 146. The earliest reported cases of equitable relief upon lost specialties belong to the last half of the seventeenth century. Underwood *v.* Staney, 1 Ch. Cas. 77; Collet *v.* Jaques, 1 Ch. Cas. 120; Anon. 1 Ch. Cas. 270; Lightlove *v.* Weeden, 1 Eq. Ab. 24, pl. 7; Sheffield *v.* Castleton, 1 Eq. Ab. 93, pl. 6.

[2] Read *v.* Brookman, 3 T. R. 151. This case was wholly without precedent at common law, was opposed to the opinion of Lord Hardwicke as expressed in Atkins *v.* Farr, 2 Eq. Ab. 247; Walmesley *v.* Child, 1 Ves. 341, 345; and Whitfield *v.* Fausset, 1 Ves. 387, 392, and did not commend itself to Lord Eldon in *Ex parte* Greenway, 6 Ves. 811, 812; Princess of Wales *v.* Liverpool, 1 Sw. 114, 119.

Fraud. — Startling as the proposition may appear, it is nevertheless true that fraud was no defence to an action at law upon a sealed contract. In 1835, in Mason *v.* Ditchbourne,[1] the defendant urged as a defence to an action upon a bond, that it had been obtained from him by fraudulent representations as to the nature of certain property; but the defence was not allowed. Lord Abinger said: "The old books tell us that the plea of fraud and covin is a kind of special *non est factum*, and it ends 'and so the defendant says it is not his deed.' Such a plea would, I admit, let in evidence of any fraud in the execution of the instrument declared upon: as if its contents were misread, or a different deed were substituted for that which the party intended to execute. You may perhaps be relieved in equity, but in a court of law it has always been my opinion that such a defence is unavailing, when once it is shown that the party knew perfectly well the nature of the deed which he was executing." This case was followed in 1861 in Wright *v.* Campbell,[2] Byles, J, remarking: "Surely, though you shewed the transaction out of which it arose to have been fraudulent, yet in an action at *law*, on the *deed*, that would not be available as a *legal* defence."

Under the Common Law Procedure Act of 1854, § 83, fraud was pleadable in such cases as an equitable plea; for, from very early times, equity would grant a permanent unconditional injunction against an action upon a specialty got by fraud.[3]

In the United States there are numerous decisions disallowing the defence of fraud in an action at law upon a specialty.[4] This is still the rule in the Federal courts, and was applied in 1894.[5]

---

[1] 1 M. & Rob. 460, 2 C. M. & R. 720 n. (a) s. c.

[2] 2 F. & F. 393. See also Bignold *v.* Bignold, 1 Mad. Ch. Pr. (3d ed.) 383; Spencer *v.* Handley, 4 M. & Gr. 414, 419.

[3] Savill *v.* Wolfall (1584), Ch. Cas. Ch. 174, 175; Glanvill *v.* Jennings, Nels. Ch. 129; Lovell *v.* Hicks, 2 Y. & C. Ex. 46.

[4] Hartshorn *v.* Day, 19 How. 211, 222; George *v.* Tate, 102 U. S. 564; Shampean *v.* Connecticut Co., 42 Fed. R. 760; Vandervelden *v.* Chicago Co., 61 Fed. R. 54; Kennedy *v.* Kennedy, 2 Ala. 571, 592; Halley *v.* Younge, 27 Ala. 203; White *v.* Watkins, 23 Ill. 480, 482, 483; Gage *v.* Lewis, 68 Ill. 604, 613; Huston *v.* Williams, 3 Blackf. 170; Scott *v.* Perrin, 4 Bibb, 360; Montgomery *v.* Tipton, 1 Mo. 446; Burrows *v.* Alter, 7 Mo. 424; Rogers *v.* Colt, 1 Zab. 704; Stryker *v.* Vanderbilt, 1 Dutch. 482 (see also Connor *v.* Dundee Works, 50 N. J. 257, 46 N. J. Eq. 576); Vrooman *v.* Phelps, 2 Johns. 177; Dorr *v.* Munsell, 13 Johns. 430; Franchot *v.* Leach, 5 Cow. 506; Champion *v.* White, 5 Cow. 509; Dale *v.* Roosevelt, 9 Cow. 307; Belden *v.* Davies, 2 Hall, 433: Guy *v.* McLean, 1 Dev. 46; Greathouse *v.* Dunlap (Ohio), 3 McL. 302, 306; Wyche *v.* Macklin, 2 Rand. 426.

[5] Vandervelden *v.* Chicago Co., 61 Fed. R. 54.

But nearly all, if not all of the State decisions just cited, have lost their force by reason of statutory changes, so that the obligor is no longer required to resort to equity for relief. In a few States, chiefly in those where there was, in the early days, no Court of Chancery, the defence of fraud was allowed to a specialty obligor without the aid of a statute.[1]

Illegality. — If the illegality of a contract under seal appeared on the face of the instrument, no court would sanction the obvious scandal of a judgment in favor of the obligee.[2] But if the specialty was irreproachable according to its tenor, the common law, prior to 1767, did not permit the obligor to defeat the obligee by showing that the instrument was in fact given for an illegal or immoral purpose.[3] The only remedy of the obligor was a bill in equity for an injunction against the action at law. Such bills were very common.[4]

But the common-law rule was changed in 1767 by Collins *v.* Blantern[5] which sanctioned the *legal* defence of illegality. The opinion of the court delivered by Wilmot, C. J., bears the unmistakable signs of an innovation. "We are all of opinion that the bond is void *abi initio* by the common law, by the civil law, moral law, and all law whatever." And yet the learned judge was unable to cite a single authority. "I should have been extremely sorry if this case had been without remedy at common law. *Est boni judicis ampliare jurisdictionem.*" This decision, being before the Revolution, was naturally followed in this country.

Failure of Consideration. — As fraud and illegality were not legal defences to an action upon a specialty, no one will be surprised

[1] Union Bank *v.* Ridgely, 1 Har. & G. 324, 416; Edelin *v.* Sanders, 8 Md. 118, 131; Dorsey *v.* Monnett (Md. 1890), 20 Atl. R. 196; Partridge *v.* Messer, 14 Gray, 180; Milliken *v.* Thorndike, 103 Mass. 382; Stubb *v.* King, 14 S. & R. 206, 208; McCulloch *v.* McKee, 16 Pa. 289; Phillips *v.* Potter, 7 R. I. 289; Gray *v.* Hankinson, 1 Bay, 278; Means *v.* Brickett, 2 Hill, Ch. 657.

[2] Y. B. 2 Hen. IV. 9–44; Thompson *v.* Harvey, Comb. 121; Taylor *v.* Clarke, 2 Show. 345; Norfolk *v.* Elliott, 1 Lev. 209, Hard. 464, s. c.

[3] Macrowe's Case (1585), Godb. 29, pl. 38; Brook *v.* King (1588), 1 Leon. 73; Jones's Case, 1 Leon. 203; Oldbury *v.* Gregory (1598), Moore, 564 (*semble*); Jenk. Cent. Cas. 108; Law *v.* Law (1735), Cas. t. Talb. 140. See also Andrews *v.* Eaton (1729), Fitzg. 73; Downing *v.* Chapman (1765), 9 East, 414, n. (a).

[4] Tothill (ed. 1649), 26, 26, 27, 27; Tothill (ed. 1671), 27, 81, 84, 86; 1 Vern. 348, 411, 412, 475; 2 Vern. 70, 291, 652, 764; Blackwell *v.* Redman, 1 Ch. Rep. 88; Hall *v.* Potter, 3 Lev. 411; Kemp *v.* Coleman, 1 Salk. 156; Law *v.* Law, 3 P. Wms. 391; Rawden *v.* Shadwell, Amb. 269; Newman *v.* Franco, 2 Anst. 519; Andrew *v.* Berry, 3 Anst. 634; Harrington *v.* Duchatel, 1 Bro. C. C. 124.

[5] 2 Wils. 341.

to find that the rule was the same as to failure of consideration. The doctrine is explicitly stated by Bracton: "Nec habebit exceptionem pecuniae non numeratae contra scripturam."[1] A case of the time of Henry VI.[2] illustrates pointedly the purely equitable nature of the obligor's relief, and also the possibly limited scope of that relief. The obligor, being sued at law, applied to the Chancellor for relief, on the ground that he had not received any part of the expected equivalent for which he had executed his bond. The Chancellor consulted the judges of both Benches, who were all of opinion, that in conscience the obligee ought to surrender the bond or execute a release. The Chancellor made a decree accordingly against the obligee.[3] The latter, however, refused to give up the bond or to release it, and was thereupon committed to the Fleet for contempt. He persisted however, although in prison, in the prosecution of his action at law, and the same judges of the Common Bench, who had advised the Chancellor to make his decree against the obligee, now gave judgment at law in his favor. The judges were clearly right both as to their advice and their subsequent judgment. Equity acts *in personam*, not *in rem*. The Chancellor could imprison the obligee for disobedience of his decree, but he could not nullify the bond. After 1854 obligors could make use of the statutory equitable plea of failure of consideration, which was an absolute bar to the action.

The English rule against the admissibility of failure of consideration as a defence at law was followed in this country in a number of early decisions;[4] but, by statute, these decisions no longer govern except in the Federal Courts.[5]

---

[1] Bracton, 100, b.

[2] Y. B. 37 Hen. VI. 13-3.

[3] See also Savell *v.* Romsden (Ed. VI.), 1 Cal. Cl. cxxxi; Tourville *v.* Naish, 3 P. Wms. 307.

[4] Hartshorn *v.* Day, 19 How. 211, 222; Leonard *v.* Bates, 1 Blackf. 172; Huston *v.* Williams, 3 Blackf. 170, 171; Fitzgerald *v.* Smith, 1 Ind. 310, 313; Bates *v.* Hinton, 4 Mo. 78; Hoitt *v.* Holcomb, 23 N. H. 535, 554; Doolan *v.* Sammis, 2 Johns. 179 n.; Dorr *v.* Munsell, 13 Johns. 430; Parker *v.* Parmele, 20 Johns. 130. The opposite rule was adopted in South Carolina, Gray *v.* Handkinson, 1 Bay, 278; Adams *v.* Wylie, 1 N. & Mc. 78; Tunno *v.* Fludd, 1 McC. 121; and in Pennsylvania, McCulloch *v.* McKee, 16 Pa. 289.

[5] The framers of the New York statute, 2 Rev. St. 406, § 77, seem not to have discriminated between the failure of an expected consideration, and the absence of a consideration where none was intended. By making the seal "only presumptive evidence of a sufficient consideration which may be rebutted," they not only let in an equitable defence at law, but also abolished gratuitous sealed obligations altogether.

Payment. — How completely ethical considerations were ignored by the common-law judges in dealing with formal contracts, is shown by the numerous cases deciding that a covenantor who had paid the full amount due, but without taking a release, must, nevertheless, pay a second time, if the obligee was unconscionable enough to bring an action on the specialty.[1] Nay, more, even though the specialty was upon payment surrendered to the obligor, the latter was still not safe unless he cancelled or destroyed the specialty. For, if the obligee should afterwards get possession of the instrument, even by a trespass, the obligor, notwithstanding the payment, the surrender, and the trespass, would have no defence to an action at law by the obligee, "because of the mischief that would befall the plaintiff if one should be received to avoid an obligation by such averment by bare words, and also because there is no mischief to the defendant if his plea be true, since he may have a writ of Trespass for the carrying off of the obligation, and recover damages for the loss sustained in this action."[2]

As in the case of fraud and illegality, so in the case of payment. Equity at length gave relief to the obligor by restraining actions at law. In 1483, Chancellor Rotheram asked the advice of the judges as to the propriety of issuing an injunction against the recognizee in a statute-merchant which had been paid by the recognizor. The judges were opposed to the injunction, Hussey, C. J., saying: "It is less of an evil to make obligors pay a second time for their negligence than to disprove matter of record or specialty by two witnesses." The Chancellor remarked that it was the common course in Chancery to grant a subpœna in the case of a specialty. In the end, however, in deference to the judges,

---

[1] "And although the truth be, that the plaintiff is paid his money, still it is better to suffer a mischief to one man than an inconvenience to many, which would subvert a law; for if matter in writing may be so easily defeated and avoided by such surmise and naked breath, a matter in writing would be of no greater authority than a matter of fact." Dy. 51, pl. 15. See to the same effect, Anon. (1200) 2 Rot. Cur. Reg. 207; Y. B. 20 & 21 Ed. I. 305; Y. B. 5 Ed. III. 63–106; Y. B. 20 Hen. VI. 28–21; Y. B. 22 Ed. IV. 51–8; Anon. (1537) Dy. 25, pl. 60; Nichol's Case (1565), 5 Rep. 43, Cro. El. 455 s. c.; Kettleby *v.* Hales (1684), 3 Lev. 119; Mitchell *v.* Hawley, 4 Den. 414, 418, and the cases cited in the next note.

[2] Y. B. 5 Hen. IV. 2–6; Y. B. 22 Hen. VI. 52–24; Y. B. 37 Hen. VI. 14–3; Y. B. 5 Ed. IV. 4–10; Y. B. 1 Hen. VII. 14–2; Waberley *v.* Cockerell, Dy. 51, pl. 12; Cross *v.* Powell, Cro. El. 483; Atkins *v.* Farr, 2 Eq. Ab. 247; Licey *v.* Licey, 7 Barr, 251, 253. In the last case Gibson, C. J., said: "Even if a bond, thus delivered [to the obligor] but not cancelled, come again to the hands of the obligee, though it be valid at law, the obligor will be relieved in equity."

he declined to issue a subpœna in the case before him, as it concerned a record obligation, and reserved his judgment as to what should be done in the case of a specialty.[1] But the common course of relieving the obligor of a paid specialty was adhered to,[2] and was later extended to the case of the paid record obligation.[3]

In 1707, by St. 4 & 5 Anne, c. 16, § 11, payment without a release was made a valid legal defence.

Accord and Satisfaction. — From time immemorial the acceptance of anything in satisfaction of the damages caused by a tort would bar a subsequent action against the wrong-doer.[4] Accord and satisfaction was, likewise, a bar to an action for damages arising from a breach of a covenant.[5] But if the covenant was of such a nature as to create a debt, the creditor's right to maintain an action at law was in no wise affected, although he might have received, in satisfaction of the debt, property far exceeding in value the amount due by the specialty.[6] "There is a difference where a duty accrues by the deed in certainty, *tempore confectionis scripti*, as by covenant, bill, or bond to pay a sum of money; there this certain duty takes its essence and operation originally and solely by the writing; and therefore it ought to be avoided by a matter of as high a nature, although the duty be merely in the personalty. But where no certain duty accrued by the deed, but a wrong or default subsequent together with the deed gives an action to recover damages, which are only in the personalty; for such wrong or de-

---

[1] Y. B. 22 Ed. IV. 6–18.

[2] Y. B. 7 Hen. VII. 12–2; Doct. & St., Dial. I. c. 12, Dial. II. c .6; Cavendish *v.* Forth, Toth. 90; Dowdenay *v.* Oland, Cro. El. 708; Huet *v.* De la Fontaine, Toth. 273. In the Treatise on Subpœna in the appendix to Doct. & St. (18th Ed.) the practice of giving equitable relief to the obligor is vigorously attacked by a Sergeant-at-law, who says; "I marvel much what authority the Chancellor hath to make such a writ in the king's name, and how he dare presume to make such a writ to let [hinder] the king's subjects to sue his laws, the which the king himself cannot do righteously; . . . and so meseemeth that such a suit by a subpœna is not only against the law of the realm, but also against the law of reason. Also, meseemeth, that it is not comformable to the law of God. For the law of God is not contrary in itself, *i. e.* to say one in one place and contrary in another place."

[3] Clethero *v.* Beckingham, Toth. 276.

[4] Anon. Y. B. 21 & 22 Ed. I. 586; Y. B. Hen. VI. 25–13; Y. B. 34 Hen. VI. 43–44; Andrew *v.* Boughey, Dy. 75, pl. 23.

[5] Blake's Case, 6 Rep. 43, b., Cro. Jac. 99 s. c.; Eeles *v.* Lambert, Al. 38; Spence *v.* Healey, 8 Ex. 668; Mitchell v. Hawley, 4 Den. 414.

[6] Preston *v.* Christmas, 2 Wils. 86; Mussey *v.* Johnson, 1 Ex. 241; Steeds *v.* Steeds, 22 Q. B. D. 537; Savage *v.* Blanchard, 148 Mass. 348, 350; Mitchell *v.* Hawley, 4 Den. 414.

fault accord with satisfaction is a good plea."[1] In other words, the breach of a covenant sounding in damages, like the breach of an assumpsit, seems to have been conceived of as a tort;[2] whereas a specialty debt was the grant by deed of an immediate right, which must subsist until either the deed was cancelled or there was a reconveyance by a deed of release. This continued the rule at common law until 1854, when the specialty debtor was, by statute, allowed to bar the satisfied creditor by a plea on equitable grounds;[3] for he was plainly entitled before this time to a permanent unconditional injunction.[4]

Discharge of Surety. — It is a familiar doctrine of English law that a creditor, who agrees to give time to a principal debtor, thereby discharges the surety unless he expressly reserves his right against the latter. But if the surety's obligation was under seal, his only mode of resisting the creditor on the ground of such indulgence was by applying to a Court of Equity for an injunction.[5] He had no *legal* defence to the creditor's action.[6] The rule was the same in England, and in a few of our States, where the principal and surety were co-makers of a promissory note.[7]

The English statute of 1854, introducing pleas on equitable grounds, now gives the surety an equitable defence at law. And, generally, in this country the defence has been allowed to actions on notes without the aid of a statute.[8]

---

[1] Blake's Cas. 6 Rep. 43, b.

[2] "And when it [the covenant] is broken, the action is not founded merely upon the specialty as if it were a duty, but savors of trespass, and therefore an accord is a good plea to it." Eeles *v.* Lambert, Al. 38. "But the cause of action accrues by the tort subsequent." Rabbetts *v.* Stoker, 2 Roll. R. 187, 188. "Covenant is executory and sounds only in damages, and a tort, which (as it seems) dies with the person," per Baldwin, J., in Anon. Dy. 14. See also Sir Frederick Pollock's "Contracts in Early English Law," 6 HARVARD LAW REVIEW, 400.

[3] Steeds *v.* Steeds, 22 Q. B. D. 537. See also Savage *v.* Blanchard, 148 Mass. 348, 350.

[4] Webb *v.* Hewitt, 3 K. & J. 438.

[5] Rees *v.* Berrington, 2 Ves. Jr. 542.

[6] Bulteel *v.* Jarrold, 8 Price, 467; Davey *v.* Prendergrass, 5 B. & Al. 187; Ashbee *v.* Pidduck, 1 M. & W. 564; Parker *v.* Watson, 8 Ex. 404; Sprigg *v.* Mt. Pleasant, Bank, 10 Pet. 257; U. S. *v.* Howell, 4 Wash. C. C. 620; Locke *v.* U. S., 3 Mass. 446; Wittmer *v.* Ellison, 72 Ill. 301; Tate *v.* Wymond, 7 Blackf. 240; Lewis *v.* Harbin, 5 B. Mon. 564; Pintard *v.* Davis, Spencer, 205; Shaw *v.* McFarlane, 1 Ired. 216; Holt *v.* Bodey, 18 Pa. 207; Dozier *v.* Lee, 7 Humph. 520; Burke *v.* Cruger, 8 Tex. 66; Steptoe *v.* Harvey, 7 Leigh. 501; Sayre *v.* King, 17 W. Va. 562.

[7] Pooley *v.* Harradine, 7 E. & B. 431; Yates *v.* Donaldson, 5 Md. 389; Anthony *v.* Fritts, 45 N. J. 1.

[8] 2 Ames, Cas. on Bills and Notes, 82 n. 2.

Accommodation. — An obligee, for whose accommodation the obligor has executed an instrument under seal, certainly ought not to enforce the specialty against the obligor who has befriended him, and whom, by the very nature of the transaction, he was bound to save harmless from any liability to any one. But prior to 1854 the obligor would have had no defence at law to an action by the obligee. In Shelburne *v.* Tierney,[1] a bill filed by the obligor to restrain an action by the obligee was assumed by both parties to be valid, but was defeated by an answer showing that the action, although in the name of the obligee, was really brought in behalf of an assignee of the obligation. The facts were similar in Dickson *v.* Swansea Co.,[2] except that the obligor pleaded an equitable plea instead of filing a bill, and the obligee met this by an equitable replication to the same effect as the answer to the bill in Shelburne *v.* Tierney.[3]

Duress. — The general rule, that the misconduct of the obligee in procuring or enforcing a specialty obligation was no bar at common law to an action upon the instrument, was subject to one exception. As far back as Bracton's time, at least, one who had duly signed and sealed an obligation, and who could not therefore plead *non est factum*, might still defeat an action by pleading affirmatively that he was induced to execute the specialty by duress practised upon him by the plaintiff.[4] The Roman law was more consistent than the English law in this respect. For, by the *jus civile*, duress, like fraud, was no answer to a claim upon a formal contract. All defences based upon the conduct of the obligee were later innovations of the prætor, and were known as *exceptiones prætoriæ*, or as we should say, equitable defences.[5]

It is quite possible that the anomalous allowance of the defence of duress at common law may be due to some forgotten statute.[6]

---

1 Bro. C. C. 434.

2 L. R. 4 Q. B. 44.

3 For similar decisions see Farrar *v.* Bank of N. Y., 90 Ga. 331; Meggett *v.* Baum, 57 Miss. 22; Freund *v.* Importer's Bank, 76 N. Y. 352. But see *contra*, Wetter *v.* Kiley, 95 Pa. 461.

4 Bracton, 16, b, 17.

5 The learned reader who desires to study the nature of Roman *exceptio* will find the subject thoroughly discussed in Eisele, Die materielle Grundlage der Exceptio; Zimmermann, Kritische Bemerkungen zu Eisele's Schrift; Lenel, Ueber Ursprung und Wirkung der Exceptionen.

6 The language of Britton, 1 Nich. Br. 47, is certainly significant: "We will that contracts made in prison shall be held valid unless made under such constraint as includes fear of death or torture of body; and in such case they shall reclaim their

But whatever its origin, the defence of duress does not differ in its nature from the defence of fraud. As Mr. Justice Holmes well says: "The ground upon which a contract is voidable for duress is the same as in the case for fraud; and is that, whether it springs from a fear or from a belief, the party has been subjected to an improper motive for action."[1] Duress was, therefore, never regarded as negativing the legal execution of the obligation. "The deed took effect, and the duty accrued to the party, although it were by duress and afterwards voidable by plea."[2] The defence is strictly personal, and not real; that is, it is effective, like all equitable defences, only against the wrong-doer, or one in privity with him. Duress by a stranger cannot, therefore, be successfully pleaded in bar of an action by an innocent obligee;[3] and duress by the payee upon the maker of a negotiable note will not affect the rights of a subsequent *bona fide* holder for value.[4]

By statute or judicial innovation, as we have seen, the jurisdiction of the common-law courts has been greatly extended, except in the Federal Courts of this country, in the matter of defences to actions on formal contracts. In all cases, where, formerly, a defendant was obliged to apply to equity for relief against an unconscionable plaintiff, he may now defeat his adversary at law. But the change of forum does not mean any change in the essential character of the relief. The common law accomplishes, by peremptorily barring the action, the same result, and upon the same grounds, that the Chancellor effected by a permanent unconditional injunc-

deeds as soon as they are at liberty and signify the fear they were under to their nearest neighbors and to the coroner; and if they do not reclaim such deeds by plaint within the year and day, the deeds shall be valid." See also 1 Nich. Britt. 223; Bract. 16, b, 17; 2 Bract. N. B. Nos. 182, 200; 3 Bract. N. B. Nos. 1643, 1913.

[1] Fairbanks *v.* Snow, 145 Mass. 152, 154.

[2] Y. B. 8 Hen. VI. 7–15, per Martin, J. Duress was not admissible under a plea of *non est factum*. Y. B. 7 Ed IV. 5–15; Y. B. 1 Hen. VII. 15, b–2; Y. B. 14 Hen. VIII. 28, a–7; Whelpdale's Case, 5 Rep. 119. On the same principle, a feoffment under duress was effectual as a transfer of the seisin. Y. B. 2 Ed. IV. 21–16; Y. B. 18 Ed. IV. 29–27.

[3] Y. B. 45 Ed. III. 6–15 (*semble*); Anon. Keilw. 154, pl. 3; Fairbanks *v.* Snow, 145 Mass. 152.

[4] Duncan *v.* Scott, 1 Camp. 100 (*semble*); Beals *v.* Neddo, 1 McCrary, 206; Hogan *v.* Moore, 48 Ga. 156; Lane *v.* Schlemmer, 114 Ind. 296; Bank *v.* Butler, 48 Mich. 192; Briggs *v.* Ewart, 51 Mo. 249 (*semble*); Clark *v.* Pease, 41 N. H. 414. Similarly a grantor under duress cannot recover his property if the wrong-doer has conveyed it to an innocent purchaser. Rogers *v.* Adams, 66 Ala. 600; Deputy *v.* Stapleford, 19 Cal. 302; Bazemore *v.* Freeman, 58 Ga. 276; Lane *v.* Schlemmer, 114 Ind. 296; Mundy *v.* Whittemore, 15 Neb. 647; Schroader *v.* Decker, 9 Barr, 14; Cook *v.* Moore, 39 Tex. 255; Tallay *v.* Robinson, 22 Grat. 888.

tion. It is as true to-day as it ever was, that fraud, payment, and the like, do not nullify the title of the fraudulent or paid obligee, but are simply conclusive reasons why he ought not to enforce his title.

The truly equitable or personal character of these defences at law has commonly only a theoretical value in actions upon the ancient common-law specialty, the instrument under seal.[1] But it is of the highest practical importance in actions upon the modern mercantile specialty, the bill of exchange or promissory note.[2] For the legal title to bills and notes, by reason of their negotiability, passes freely from hand to hand, and equity would not restrain, by injunction, any holder from enforcing his title, if he came by it honestly and for value. And the plea at law being, in substance, like the bill in equity for an injunction, we see at once the reason for the familiar rule that fraud and other defences, based upon the conduct of the payee or some other particular person, cannot be successfully pleaded against any *bona fide* holder for value.

James Barr Ames.

---

[1] But the equitable nature of these defences explains the right of an innocent obligee to recover in covenant even though the defendant was induced to execute it by the improper conduct of a third person.

[2] Because assumpsit would lie upon them, the notion became current that bills and notes were simple contracts. In Scotland, and in Europe generally, a bill or note is recognized to be a *literarum obligatio*, and the logic of facts is sure to compel, eventually, a similar recognition in England and this country.